89-923

No. 89-

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

WALTER BALL AND BARRY KABINOFF,
Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

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Question Presented

Are a fire insurance claimant's Fifth Amendment rights violated where, after he has twice refused to answer the questions of the Police, they arrange for the attorney for his insurance company to act as their agent and compel the claimant, through the exercise of economic coercion, to submit to an examination under oath which is then used as the basis for the claimant's arrest for arson?

Parties to the Proceeding

Petitioners are Walter Ball and Barry Kabinoff. They were Appellees in the Pennsylvania Supreme Court. Respondent is the Commonwealth of Pennsylvania, which was the Appellant in the Pennsylvania Supreme Court.

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Opinions Below

The decision of the Pennsylvania Supreme Court from which Petitioners seek review by this Court is not yet published. It is reproduced in the Appendix at A3a-A10a. The Pennsylvania Superior Court's opinion in this matter was not published, but is reproduced in the Appendix at A11a-A38a. The decision of the suppression court was published at 15 Phila. 190 (1987), and is set forth in the Appendix at A18a-A38a.

Jurisdiction

The judgment of the Pennsylvania Supreme Court was entered on October 6, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257.

Constitutional Provision Involved

The Fifth Amendment to the United States Constitution provides, in pertinent part, that "No person . . . shall be compelled in any criminal case to be a witness against himself. . ."

Statement of the Case

Petitioners Walter Ball and Barry Kabinoff are the owners of Austin Truck Rental, Inc., which formerly leased a garage building on Church Street in Philadelphia. A fire occurred in that building on the evening of March 16, 1982, causing damage to the building and its contents. On the evening of the fire, Lt. Thomas Schneiders, Assistant Fire Marshall, determined that the fire was of an incendiary nature, and several days later he classified it as an arson. (A19a).

On March 25, 1982, Lt. Schneiders and Police Detective James McKee briefly questioned Mr. Ball. He denied having any knowledge about the fire, and declined to

answer their questions. (R. 902a).[1] On June 7, 1982, Detective McKee again attempted to question Mr. Ball, and once again he refused to be questioned. (R. 903a). Thereafter, Detective Daniel Hogan of the Police Arson Squad was assigned to investigate the fire, and he testified that *he made no effort to question Mr. Bail because "I knew Mr. Ball didn't want to talk to anybody . . . I just assumed it would be a waste of time to go up and talk to him."* (R. 533a-534a).

After the fire, Austin Truck Rental submitted a claim to its fire insurance carrier, Hartford Accident and Indemnity Company ("Hartford"). The total amount of the claim was $91,332.35. (A5a). On June 15, 1982, the Hartford file relating to the Church Street fire was transmitted to Hartford's counsel, Michael Henry. (A6a). That file contained a copy of the Fire Marshall's report classifying the fire as an arson. (A20a). Mr. Henry, who had previously been a Philadelphia Assistant District Attorney for 7 years before entering private practice, promptly placed a telephone call to his former colleague, Larry Brown, who was Chief of the Economic Crimes Unit in the District Attorney's Office and liaison with the Fire Marshall's Office, "[t]o see if he knew anything about the fire." (A20a). After speaking with Asst. D.A. Brown, Mr. Henry spoke with Detective Hogan, and Mr. Henry arranged to meet with Detective Hogan the following day "to see what the extent of his [Hogan's] investigation was." (R. 103a).

Mr. Henry met with Detective Hogan on June 16, 1982 (just *one day* after having received Hartford's file relating to the fire) and told him that "I was interested in knowing what information they [the Police] had." (R. 118a). Detective Hogan allowed Mr. Henry to review the highly confidential and sensitive Police Investigation Reports relating to the Church Street fire which had been prepared thus far.

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1. Citations with the prefix "R." are to the voluminous Record filed in the Pennsylvania Supreme Court.

(A6a). Mr. Henry learned from this review that: (a) Messrs. Ball and Kabinoff were under investigation by the Police and Fire Departments; (b) the Police were suspicious of the amount of inventory listed in the Proof of Loss submitted to Hartford; and (c) Mr. Ball had refused to be questioned by the Police. (A21a).

One week later, on June 23, 1982, Mr. Henry met with Lt. Schneiders and Capt. Charles LePre of the Fire Department. (A20a). During this meeting, Mr. Henry asked Lt. Schneiders and Capt. LePre a number of questions about their investigation into the cause and origin of the fire, and they confirmed to him that the fire was classified as an arson and that Messrs. Ball and Kabinoff were considered prime suspects in their investigation. (R. 136a-143a).

On June 24, 1982, only *one day* after his meeting with Lt. Schneiders and Capt. LePre, Mr. Henry sent a letter to Messrs. Ball and Kabinoff demanding that they submit to an examination under oath by him pursuant to the requirements of their insurance policy. (A6a). The suppression court found that Detective Hogan and Lt. Schneiders both knew of Mr. Henry's intention to demand that Messrs. Ball and Kabinoff submit to an examination under oath. (A22a-23a). Moreover, Mr. Henry conceded that he "may have" informed Detective Hogan and Lt. Schneiders of his intention to demand that Messrs. Ball and Kabinoff submit to an examination under oath by him. (A21a).

During the intervening period between his June 23, 1982 meeting with Lt. Schneiders and Capt. LePre and the July 21-22, 1982 examination under oath of Messrs. Ball and Kabinoff, Mr. Henry had numerous telephone conversations with Detective Hogan, Capt. LePre and Asst. D.A. Brown "to inquire as to the status of their investigation". (R. 198a, R. 207a).

On July 21 and 22, 1982, after having been fully apprised by the law enforcement authorities of all of the

information they had gleaned during their investigation, Mr. Henry conducted the examination under oath of Messrs. Ball and Kabinoff. Mr. Henry admonished them at the very outset of the examination that they were *obligated* under their insurance policy to answer *every single question* which he propounded to them:

> [I]f I ask you a question which you deem immaterial to your claims submission to Hartford and you do not want to respond to it *you should realize that that failure to respond may in and of itself be considered a material breach of the policy of insurance.* If you are uncomfortable with my questions or they intimidate you in any fashion and you don't answer my questions, I would just let you know that *it is your duty to appropriately respond whether or not your attorney directs you not to.* (A31a) (emphasis added).

The examination lasted for two days and the transcript of the examination is 375 pages long. At no time during the examination under oath did Mr. Henry inform Messrs. Ball and Kabinoff that he had previously met and shared information with investigators from the Police and Fire Departments, reviewed confidential Police Investigation Reports concerning the fire, and learned that Messrs. Ball and Kabinoff were considered prime suspects in the investigation by the Police and Fire Departments. (A31a)

After the examination under oath was transcribed, it was promptly provided by Mr. Henry to the District Attorney's Office, and thereafter certain statements made during the examination were relied upon in Detective Hogan's Affidavit of Probable Cause for the arrest of Messrs. Ball and Kabinoff. (A24a-25a; 29a). They were charged with arson, causing or risking a catastrophe, conspiracy and attempted theft.

Prior to trial, the defendants moved to suppress the Commonwealth's introduction into evidence of the transcript of the examination under oath on the grounds that it represented compelled testimony which was obtained by

the Commonwealth through a violation of their Fifth Amendment rights. (A25a, 38a-45a). The suppression court held an extensive evidentiary hearing on the motion to suppress and thereafter granted the motion, finding that (1) Mr. Henry had acted as an agent or instrument of the Commonwealth in conducting the examination under oath; and (2) Mr. Henry had violated the defendants' Fifth Amendment rights by compelling their testimony through the impermissible exercise of economic coercion. (A18a-37a). The Pennsylvania Superior Court unanimously affirmed the suppression court's order and adopted its opinion as its own. (A11a-17a). However, on October 6, 1989 the Pennsylvania Supreme Court reversed the decisions of the Superior Court and suppression court. (A3a-10a). The Supreme Court did *not* hold that the lower courts had erred in finding that Mr. Henry acted as an agent or instrument of the Commonwealth, but instead based its decision solely on its determination that the defendants had waived their Fifth Amendment rights by submitting to the examination under oath.

Reasons for Granting The Writ

The facts adduced during the suppression hearing clearly support the finding of the suppression court and Superior Court that Mr. Henry acted as "an agent of the Commonwealth of Pennsylvania during the course of his investigation and subsequent examination under oath of the defendants". (A26a). Mr. Henry met and conversed on numerous occasions with the law enforcement authorities who investigated the Church Street fire, and they exchanged all of their information with one another and worked hand-in-glove in furtherance of their shared objective of implicating Messrs. Ball and Kabinoff in connection with that fire.

The "symbiotic" relationship between the Commonwealth and Mr. Henry (A26a), which was cloaked under

the protective mantle of the Arson Reporting Immunity Act,[2] redounded to their mutual benefit. It enabled the Commonwealth to accomplish indirectly what it had previously tried, without success, to do directly — to wit, interrogate Messrs. Ball and Kabinoff concerning the fire. As the suppression court correctly found, "the investigations of the Philadelphia Police and Fire Departments were stymied and the examination under oath, unbeknownst to the defendants, was the Commonwealth's only avenue to proceed forward and ultimately effectuate the defendants' arrest". (A28a). The close cooperation between the Commonwealth and Mr. Henry also greatly benefited his client, Hartford, because the Commonwealth's initiation of criminal proceedings against the defendants enabled Hartford to forestall payment of the fire insurance claim which they submitted. Thus, Mr. Henry was amply motivated to assist the Commonwealth's investigation, because its prosecution of the defendants would benefit his client.

This Court has repeatedly held that the acts of private individuals may, under certain circumstances, be deemed "governmental" actions and may therefore amount to violations of a defendant's constitutional rights. The fundamental principle enunciated in these cases is that the government may not circumvent constitutional limitations upon its conduct by utilizing a private individual to perform a forbidden act on its behalf. As this Court has stated, the "critical factor" in such cases is determining whether or not the private individual "in light of all the circumstances of the case, must be regarded as having acted as an 'instrument' or agent of the state . . ." *Coolidge v. New Hampshire,* 403 U.S. 443, 487 (1971). *Accord Skinner v. Railway Labor Executives Ass'n,* ____ U.S. ____ 109 S.Ct.

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2. The Act confers immunity from criminal prosecution and civil liability upon an insurance company and its representatives who furnish information to investigative agencies pursuant to requests under the Act, "unless there be actual malice". 40 Pa.S.A. §1610.4.

1402, 1411-12 (1989); *United States v. Jacobsen,* 466 U.S. 109, 113-14 (1984); *Burdeau v. McDowell,* 256 U.S. 465, 475 (1921).

Just last Term, this Court declared that where there are "clear indices of the Government's encouragement, endorsement, and participation" in an otherwise private search, the search may be imputed to the Government and may implicate the rights protected under the Fourth Amendment. *Skinner, supra,* 109 S.Ct. at 1412. Indeed, this Court made it clear in *Skinner* that "[t]he fact that the Government has not compelled a private party to perform a search does not, by itself, establish that the search is a private one". *Id.* at 1411.

In the instant case, as in *Skinner,* "the Government did more than adopt a passive position toward the underlying private conduct". *Id.* at 1411. A review of the facts set forth above and at greater length in the suppression court's opinion clearly supports that court's determination that Mr. Henry had a "symbiotic" relationship with the Commonwealth and acted as its agent in conducting the examination under oath. It bears reiteration here that this determination was *not* reversed by the Pennsylvania Supreme Court.

Detective Hogan and Lt. Schneiders both knew that Mr. Henry would be taking an examination under oath of the defendants, and they also knew that it was in the Commonwealth's best interest that Mr. Henry be fully informed as to what the Police and Fire Department investigators had learned prior to taking the examination. Indeed, in explaining why he showed the highly confidential Police Investigation Reports to Mr. Henry during their June 16, 1982 meeting, Detective Hogan acknowledged:

> If they're [Hartford] going to investigate and we're going to investigate, if we're leading to the same direction, if we can assist each other, that's part of the reason. (R. 457a-458a).

Detective Hogan realized that Messrs. Ball and Kabinoff would refuse to talk to him, and he knew that he could do an "end run" through his surrogate, Mr. Henry, who could and would exercise Hartford's considerable economic leverage to compel them to submit to an examination under oath. As the suppression court observed, "[t]hrough economic coercion and compulsion of the defendants to submit to an examination under oath, [Mr. Henry] was able to achieve what the Commonwealth could not — testimony of the defendants under oath and an employee list of Austin Truck Rental, Inc." (A30a).

In addition to finding that Mr. Henry acted as an "instrument" or "agent" of the Commonwealth, the suppression court also found that he "exerted extreme economic leverage and compulsion over the defendants to the benefit of his client and the Commonwealth." (A28a). The suppression court therefore properly concluded that "the examination under oath is clearly *compelled* testimony which is violative of the [defendants'] Fifth Amendment rights and must be suppressed along with the fruits thereof." (A30a-31a) (emphasis in original).

In reversing the suppression order, the Pennsylvania Supreme Court reasoned that since the defendants testified at the examination under oath, they waived their Fifth Amendment rights. This decision ignores the fact that the defendants had *twice* previously *refused* to be questioned by the Police, and they submitted to extensive interrogation by Mr. Henry only *after* being threatened by him that a failure to appear and answer every single question he propounded would entitle Hartford to deny their insurance claim.

The Fifth Amendment not only guarantees the right to remain silent absent immunity, it also prohibits the use of a witness' compelled statements against him. Thus, a Fifth Amendment inquiry is *not* ended when a statement is made in lieu of a claim of privilege — the Court must

determine whether the witness' failure to claim the privilege was attributable to coercion or was the result of a voluntary, freely-made decision. As this Court stated in *Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977), "when a State compels testimony by threatening to inflict potent sanctions unless the constitutional privilege is surrendered, that testimony is obtained in violation of the Fifth Amendment and cannot be used against the declarant in a subsequent criminal prosecution."

Mr. Henry presented Messrs. Ball and Kabinoff with a "Hobson's choice" — either submit to an examination under oath by him and answer every one of his questions, or forfeit their right to collect their $91,332.35 insurance claim. Indeed, at the very outset of the examination, Mr. Henry admonished Messrs. Ball and Kabinoff that they were obligated to answer *all* of his questions, even "[i]f you are *uncomfortable* with my questions or they *intimidate* you in any fashion," and even if they deemed the questions to be "immaterial" to their insurance claim. (A31a). (emphasis added). He further stated that "it is your duty to appropriately respond *whether or not your attorney directs you not to.*" (A31a) (emphasis added). The attorney for Messrs. Ball and Kabinoff aptly described his clients' predicament:

> I saw my clients on the horns of a dilemma . . . the insurance company was taking the position that unless you tell us what we want to know we are not going to pay . . . (A33a).

This Court has repeatedly held that if the State seeks to induce a person to testify by threatening to impose economic sanctions upon him if he refuses to respond, and thereafter he testifies without invoking his Fifth Amendment privilege, his responses will be deemed "compelled" and will be inadmissible as evidence against him in a subsequent criminal prosecution. *See, e.g., Garrity v. New Jersey,* 385 U.S. 493 (1967); *Spevack v. Klein,* 385 U.S. 511 (1967); *Gardner v. Broderick,* 392 U.S. 273 (1968); *Uniformed Sanitation Men Ass'n, Inc. v. Commissioner of Sani-*

tation, 392 U.S. 280 (1968); *Lefkowitz v. Turley,* 414 U.S. 70 (1973); *Lefkowitz v. Cunningham,* 431 U.S. 801 (1977).

In *Garrity v. New Jersey, supra,* police officers under investigation were asked potentially incriminating questions following warnings to them that if they did not answer they would be removed from their jobs. The officers decided to answer the questions and their answers were later used over their objections in their prosecutions for conspiracy. This Court held that, in the context of threats of economic sanction, the act of responding to interrogation was *not* voluntary and was *not* an effective waiver of the Fifth Amendment privilege. 385 U.S. at 497-500. As this Court later declared in *Lefkowitz v. Turley, supra,* 414 U.S. at 72-3, "[a] waiver secured under threat of substantial economic sanction cannot be termed voluntary."[3]

Here, too, it cannot be contended that defendants voluntarily "waived" their Fifth Amendment rights by answering Mr. Henry's questions at the examination under oath, because that purported "waiver" was the direct result of economic coercion. The defendants' "Hobson's choice" of either submitting to Mr. Henry's examination under oath or suffering the denial of their insurance claim effectively deprived them of their "free choice to admit, to deny, or to refuse to answer." *Garrity v. New Jersey, supra,* 385 U.S. at 496. As this Court stated in *Garrity,* "Where the choice is 'between the rock and the whirlpool,' duress is inherent in deciding to 'waive' one or the other." *Id.* at 498.

As set forth above, it is constitutionally irrelevant that the econmic coercion was applied here by Mr. Henry rather than by a law enforcement agency or officer, because Mr.

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3. Similarly, in *Minnesota v. Murphy,* 465 U.S. 420, 435 and n. 7 (1984), the Court stated that the general rule that a person must assert the Fifth Amendment privilege or be deemed to have waived it is inapplicable in "the classic penalty situation [which excuses] the failure to assert the privilege."

Henry acted as an agent of the Commonwealth when he demanded that defendants submit to an examination under oath. In language equally applicable to the case at bar, the Court in *United States ex. rel. Sanney v. Montanye,* 500 F.2d 411, 415 (2d Cir. 1974), *cert. denied,* 419 U.S. 1027 (1974), stated as follows:

> Nor do we perceive any consequence flowing from the fact that the threat in the present case was conveyed through a private employer, admittedly acting as an agent for the police, rather than through a person on the public payroll. *The state's involvement is no less real for having been indirect and no less impermissible for having been concealed. The state is prohibited in either event from compelling a statement through economically coercive means, whether they are direct or indirect.* (emphasis added).

In this case, the suppression court did not have to speculate or engage in conjecture as to whether the defendants would have been willing to submit to interrogation absent the threat that their insurance claim would be denied if they failed to appear and respond to all questions. Prior to Mr. Henry's demand that Messrs. Ball and Kabinoff submit to an examination under oath, Detective McKee had twice attempted to question Mr. Ball and had been told by him on both occasions that he would not answer any questions. Thereafter, Detective Hogan didn't even bother to attempt such an interview, because "I knew Mr. Ball didn't want to talk to *anybody* . . . I just assumed it would be a waste of time to go up and talk to him." (R. 533a-534a) (emphasis added).

However, once Mr. Henry entered the picture, things changed dramatically, because he had at his disposal a potent weapon which was unavailable to the Police and Fire Departments — substantial economic leverage over Messrs. Ball and Kabinoff. Mr. Henry successfully exercised that powerful leverage for the benefit of both Hartford and the Commonwealth, coercing defendants into submitting to a protracted two-day examination which comprises

375 pages of transcript. In light of all of these facts and circumstances, there is ample factual and legal support for the suppression court's finding that "the testimony of the defendants was compelled in every sense of the word." (A33a).

CONCLUSION

The Pennsylvania Supreme Court's decision in this case is fundamentally at odds with this Court's teaching in *Lefkowitz v. Turley, supra,* that "a waiver secured under threat of substantial economic sanction cannot be termed voluntary." 414 U.S. at 72-73. Accordingly, Petitioners respectfully submit that certiorari should be granted by this Court.

Dated: December 6, 1989

Respectfully submitted,

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

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JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the ORDER of the Superior Court, be, and the same is hereby remanded and reversed for further proceedings consistent with this opinion.

Marlene F. Lachman, Esq.
Prothonotary

Dated: October 6, 1989

In the Supreme Court of Pennsylvania
Eastern District

COMMONWEALTH OF PENNSYLVANIA	:	No. 145 Eastern District Appeal Docket 1988
Appellant	:	
	:	Appeal from the March 14, 1988 Superior Court Order at Nos. 2412, 2413, 2448, 2455, Philadelphia, 1984 Affirming the Suppression Orders of the Court of Common Pleas of Philadelphia County, Criminal Division, at Nos. 83-05-3641-3644 and 83-05-3645-3648, Entered August 9 and 14, 1984.
v.	:	
WALTER BALL and BARRY KABINOFF, Appellees	:	___ Pa. Superior Ct. ___, ___ A.2d ___ (19)
	:	ARGUED: April 11, 1989

OPINION OF THE COURT

MR. JUSTICE PAPADAKOS FILED: OCTOBER 6, 1989

We are being asked by the Commonwealth to overturn a suppression order issued by the trial court on the grounds that Appellees were economically coerced into incriminating themselves in violation of the Fifth Amendment. Suppression was based on two interrelated findings. First, the

suppression court determined that insurance company representatives investigating a destructive fire at Appellees' property were transformed into "agents" of the state by virtue of their extensive cooperation with the police. Second, the suppression court also found that the insurance company, now allegedly acting as an arm of law enforcement, coerced the Appellees by forcing them to answer questions and deliver documents under oath or forfeit payment under the policy and thereafter turned over the testimonial transcript and documents to the police who intended to introduce the material at trial. It was this evidence given under oath which was suppressed.

The factual history of this case began with a fire which damaged the contents and a building leased by the Appellees and operated as their trucking company. On April 29, 1982, Appellees filed a claim with the Hartford Accident and Indemnity Company for $91,332.35. Several days after the fire, the Fire Marshall's office concluded that it was arson. On two occasions shortly after, the Fire Marshall sought to question both Appellees who took the position that, in addition to lacking any knowledge of the fire, they would not answer without having first consulted an attorney. Concurrently, of course, Hartford was conducting its own inquiry through its Claims Supervisor.

On June 8, 1982, the Fire Marshall's office hand delivered to Hartford's Supervisor a request for information pursuant to the Arson Reporting Act, 40 Pa.C.S. §1610.01 *et seq.*[1] Hartford turned over "pertinent policy information

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1. Relevant portions of the Act are:
§1610.3 *Disclosure of information*

(a) Fire loss information. — Any authorized agency may, in writing, require any insurance company at interest to release to the requesting authorized agency any or all relevant information or evidence deemed important to the authorized agency which the insurance company may have in its possession relating to a fire loss under investigation by the authorized agency. Relevant information may include, without limitation herein:

and statement of loss submitted . . . and other relevant information or evidence."[2] On June 15, 1982, the Claims Supervisor sent his file to Hartford's attorney, Michael Henry, for further action. Attorney Henry immediately contacted the Office of the District Attorney requesting their information. On the following day, as well as one week later, he met with police detectives who gave him access to Investigation Reports related to the fire. At all times during these activities, all investigators had concluded that the fire was due to arson.

On June 24, 1982, Attorney Henry sent a letter to the Appellees demanding that pursuant to the insurance policy they submit to questioning under oath and also deliver certain documents, including a list of employees of their firm.[3]

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(1) pertinent policy information relevant to a fire loss under investigation, including any application for such a policy;

(2) underwriting information or risk inspection reports;

(3) policy premium payment records which are available;

(4) history of previous claims made by the insured; and

(5) material relating to the investigation of the loss, including statements of any person, proof of loss, and any other information relevant to the investigation by the authorized agency.

(b) *Notification for investigation.*—

(1) Whenever the investigation of a fire loss by an insurance company insuring the loss indicates that the probable cause of the fire was arson, then the company shall notify, in writing, the appropriate authorized agency and upon the request of any authorized agency, shall provide the requesting authorized agency with such fire loss information developed from the company's inquiry into the fire loss as may be requested by the authorized agency and the insurance company may provide to any authorized agency any information it may have relating to fire loss;

2. A copy of the letter is included at S.T., pg. 878a.

3. Investigators were dubious about the claims of lost inventory and believed that employees could furnish pertinent data.

The examination took place on July 21 and 22, 1982, at Henry's office. Appellees were represented by counsel Warren Vogel.

Critical to our understanding of this matter were the following statements made prior to the commencement of the questioning:

> WALTER L. BALL and BARRY D. KABINOFF, having been duly sworn, testified as follows . . .
>
> MR. HENRY: This proceeding is an examination under oath conducted pursuant to the Hartford Accident and Indemnity Company Policy Number 39CF 420430 which policy insured the Austin Truck Rental, Inc. firm at the premises located at 2300 Church Street in Philadelphia, Pennsylvania. This examination under oath of Mr. Kabinoff and Mr. Ball deals with a fire that occurred at the premises on Church Street with the fire occurring on March 16, 1982.
>
> MR. VOGEL: I just want to state in the record an agreement which we have reached earlier today on the production of certain documents. You had sent me a rather extensive letter dated June 24, 1982 requesting that the insured submit certain documentation to you. I have had several discussions with you and I believe we have reached some form of agreement on the production which will be made, including an agreement whereby you, on behalf of your firm and on behalf of your client, have agreed that the financial and business information being delivered to you today is being delivered under a stipulation of confidentiality, specifically that none of this information will be divulged to any third person, that is any person other than members of your firm or persons within Hartford, and that both your firm and Hartford agree that it will not be disseminated elsewhere. I would like and hope you will agree that we can commit that to a written agreement within the next few days.
>
> MR. HENRY: I have no objection to the agreement with the understanding that if this, if the notes of testimony and exhibits of this case be subpoenaed by anybody that's out of the control of my law firm and Hartford to resist that sub-

poena. Aside from that we agree that none of the information that's provided us today will be divulged to any third party.

MR. VOGEL: In that same sense I believe we have an understanding that upon resolution of this matter the financial and other business information being given to you will be returned to Austin Truck Rental — let's continue off the record.

(Whereupon, a discussion was held off the record.)

MR. HENRY: Back on record.

I think we should put back on the record that Mr. Vogel and I just discussed was the fact that the exhibits that are presented to us today will remain confidential within the confines of this law office and Hartford absent any subpoenas being issued or any other such documents requesting the exhibits or the notes of testimony and upon the completion of this examination under oath I would maintain in my file copies of the exhibits as well as the examination under oath notes of testimony and we guarantee they will not be divulged to any third party. (S.T. at 872a-874a)

* * * * * *

Attorney Henry then continued exchanging information with the police and informed the District Attorney of the existence of the examination under oath. (S.T. at 347a.) On September 3, 1982, the District Attorney invoked the Act and requested Hartford to send him the transcript and documents obtained from the Appellees. The company complied, also sending along a list of the employees.

Appellees were arrested on February 4, 1983, and charged with arson, causing or risking a catastrophe, attempted theft by unlawful taking or disposition, and conspiracy. After a lengthy evidentiary hearing, the suppression court agreed to suppress specifically the transcript and employee list, the only subject matter raised in this review.

The court's suppression order and opinion, adopted by the Superior Court, agreed with the two main allegations advanced by the Appellees: that Attorney Henry was, in effect, an agent of the Commonwealth in investigating the fire; and that he coerced them economically into making self-incriminating statements under a threat of refusing to pay for their loss.[4]

Our cases have held that, indeed, under certain circumstances, the Fifth Amendment bar against compelling evidence is violated through an improper exercise of economic coercion. See, for example, our analysis in the *Matter of Glancey,* 515 Pa. 201, 527 A.2d 997 (1987), and *Commonwealth v. Triplett,* 462 Pa. 244, 341 A.2d 62 (1975). In addition, we recognize that private citizens can act as an instrument or agent of the state. *Commonwealth v. Corley,* 507 Pa. 540, 491 A.2d 829 (1985), and *Commonwealth v. Bordner,* 432 Pa. 405, 247 A.2d 612 (1968). Where such symbiotic relationships exist and baldly seek to coerce self-incrimination, we have stepped in to vindicate fundamental rights.

On the factual posture of this case, nevertheless, we now decide that the court below erroneously suppressed the evidence gained from the testimony under oath. We predicate our findings on the evidence offered here. We draw attention, at the outset, to the fact that Attorney Henry emphatically warned Appellees and their attorney that the testimony was subject to discovery by anyone with proper authority. The trial court concluded that their agreement could be pierced only by a subpoena, but Attor-

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4. Briefs submitted by both sides present a confusing argument over whether *Miranda* warnings are an issue: The lower court concluded in dicta that the legislature could resolve the problem of warning insureds by adopting a "Miranda-like" system. The Commonwealth brief also raises the *Miranda* issue, but the Appellees insist *Miranda* is not implicated. In light of the fact that no custodial interrogation occurred here, we see no basis for addressing the *Miranda* issue.

ney Henry specifically indicated that he would respond to "any other such documents requesting the exhibits or notes of testimony." In any case, a subpoena is not required under the Arson Reporting Act which merely demands that the request for information be made "in writing," which was done in this case. On this record, we determine that Appellees were warned properly that whatever they said or delivered could be divulged to an "appropriate authorized agency" pursuant to the statute. Appellees thereby waived whatever confidentiality they possessed. Furthermore, Appellees' attorney was seeking confidentiality only on business and financial records. There is no evidence that the Fifth Amendment privilege was raised at all at the meeting with Attorney Henry.

Nor are we persuaded that any coercion, properly understood, took place here. Attorney Henry's warning was that "failure to respond *may* in and of itself be considered a material breach of the policy of insurance." (Emphasis added.) That hardly amounts to coercion. Appellees could have insisted on awaiting the outcome of any criminal action before making statements in a civil proceeding. As Justice Flaherty once noted aptly: "Imposition of admittedly difficult choices is not necessarily unconstitutional." *Commonwealth v. Coder*, 49 Pa. 194, 415 A.2d 406 (1980). Appellees' choice was a difficult one, but choice there was on this record.

Reversed and remanded for further proceedings consistent with this opinion.

MR. JUSTICE LARSEN and MR. JUSTICE ZAPPALA concur in the result.

MR. CHIEF JUSTICE NIX did not participate in the consideration or decision of this matter.

COMMONWEALTH OF PENNSYLVANIA, Appellant	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
	:	
	:	
WALTER L. BALL	:	No. 2412 Philadelphia, 1984
	:	No. 2448 Philadelphia, 1984

Appeal from the Orders entered August 9 & 14, 1984, Court of Common Pleas, Philadelphia County, Criminal Division at No. 83-05-3641-3644.

COMMONWEALTH OF PENNSYLVANIA,	:	
Appellant	:	
	:	
v.	:	
	:	
	:	No. 2413 Philadelphia, 1984
BARRY KABINOFF	:	No. 2455 Philadelphia, 1984

Appeal from the Orders entered August 9 & 14, 1984, Court of Common Pleas, Philadelphia County, Criminal Division at No. 83-05-3645-3648.

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment

of the Court of Common Pleas of Philadelphia County be, and the same is hereby affirmed and remanded. Jurisdiction relinquished.

BY THE COURT:

PROTHONOTARY

Dated: March 14, 1988

COMMONWEALTH OF PENNSYLVANIA, Appellant	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
	:	
	:	
WALTER L. BALL	:	No. 2412 Philadelphia, 1984
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Appeal from the Orders entered August 9 & 14, 1984, Court of Common Pleas, Philadelphia County, Criminal Division at No. 83-05-3641-3644.

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	:	No. 2413 Philadelphia, 1984
BARRY KABINOFF	:	No. 2455 Philadelphia, 1984

Appeal from the Orders entered August 9 & 14, 1984, Court of Common Pleas, Philadelphia County, Criminal Division at No. 83-05-3645-3648.

BEFORE: CIRILLO, P.J., OLSZEWSKI and JOHNSON, JJ.

MEMORANDUM:

This case involves a Commonwealth appeal from pretrial suppression orders. Finding no merit to the Commonwealth's contentions, we affirm.

Appellees in this case were charged with arson endangering persons, arson endangering property, criminal conspiracy, attempted theft by unlawful taking or disposition and risking catastrophe. The charges were based on a 1982 fire which damaged appellees' business premises. Prior to the commencement of trial appellees moved to suppress the Commonwealth's use of a transcript of an examination of appellees conducted by their insurance company's attorney. Appellees also sought to suppress the testimony of any Commonwealth witness who was identified and located by the Commonwealth through the use of an "employee list" which appellees had been required to furnish to the insurance company's attorney. The trial court ordered the suppression of the contents of the interview by the insurance company's attorney, the employee list and the testimony of any Commonwealth witness who was identified through the use of the list. The court also denied a motion filed by the Commonwealth under inevitable discovery and independent basis.

From these suppression orders the Commonwealth appeals raising six issues:

> I. WHERE THE DEFENDANTS ARE CHARGED WITH ARSON AND THE FILING OF A FRAUDULENT INSURANCE CLAIM, AND WHERE THE COMMONWEALTH AND THE VICTIMIZED INSURANCE COMPANY CONDUCTED OVERLAPPING CIVIL AND CRIMINAL INVESTIGATIONS, ARE THE VOLUNTARY SWORN STATEMENTS OF DEFENDANTS AT A PRIOR CIVIL PROCEEDING ADMISSIBLE AT TRIAL IN THE SUBSEQUENT CRIMINAL CASE?

II. DID THE LOWER COURT APPLY AN ERRONEOUS LEGAL STANDARD WHEN IT CONCLUDED THAT THE ATTORNEY FOR DEFENDANT'S INSURANCE COMPANY WAS AN AGENT OF THE COMMONWEALTH FOR PURPOSES OF THE FIFTH AMENDMENT AND *MIRANDA*?

III. IS INFORMATION LAWFULLY OBTAINED BY THE COMMONWEALTH UNDER THE ARSON REPORTING IMMUNITY ACT SUBJECT TO THE EXCLUSIONARY RULE?

IV. WHERE AN EXAMINATION UNDER OATH IS CONDUCTED PURSUANT TO A CONTRACT OF INSURANCE, AND WHERE DEFENDANTS, ALTHOUGH REPRESENTED BY COUNSEL OF CHOICE AT THAT PROCEEDING DID NOT ASSERT THEIR CONSTITUTIONAL PRIVILEGE, CAN DEFENDANTS LATER CLAIM THAT THEIR TESTIMONY IS NEVERTHELESS PROTECTED BY THE FIFTH AMENDMENT?

V. WAS EXCLUSION OF RELEVANT EVIDENCE IN A CRIMINAL CASE AN INAPPROPRIATE SANCTION WHERE THE LOWER COURT EXPRESSLY FOUND THAT THERE WAS NO BAD FAITH ON THE PART OF ANY LAW ENFORCEMENT OFFICIAL OR AGENT?

VI. WAS THE ERRONEOUSLY SUPPRESSED EVIDENCE ADMISSIBLE IN ANY EVENT UNDER THE DOCTRINE OF INEVITABLE DISCOVERY OR INDEPENDENT SOURCE?

Before reviewing the merits of the issues we note initially that we have jurisdiction over this Commonwealth appeal from pretrial orders. When a motion to suppress is granted and the Commonwealth "asserts in good faith that it substantially handicaps or effectively terminates the prosecution for lack of evidence, the Commonwealth has the right to appeal the suppression order." *Commonwealth v. Hamlin*, 503 Pa. 210, 214, 469 A.2d 137, 138-39 (1983)

(citation omitted). Such is the situation in the case before us. Our jurisdiction and the right of the Commonwealth to appeal the suppression court's ruling is limited to pure questions of law. *Hamlin.*

In *Hamlin* our Supreme Court explained that in reviewing the trial court's suppression order we are bound by factual findings supported by the record and cannot substitute our own findings for those of the suppression court. We are not bound by findings wholly lacking in evidence. *Hamlin,* 503 Pa. at 215, 469 A.2d at 139. The Supreme Court stated that our initial task is to determine whether the factual findings are supported by the record. In making this determination:

> where the Commonwealth is appealing the adverse decision of a suppression court, a reviewing court must consider only the evidence of the defendant's witnesses and so much of the evidence for the prosecution as read in the context of the record as a whole remains uncontradicted.

Hamlin, 503 Pa. at 216, 469 A.2d at 139.

In reviewing a suppression issue in *Commonwealth v. Bonasorte,* 337 Pa. Super. 332, 486 A.2d 1361 (1984) this Court noted:

> that "[i]t is incontrovertible that, here in Pennsylvania, the Commonwealth and not defendant, has the initial burden of going forward with the evidence and of establishing that the challenged evidence was not obtained in violation of defendant's rights. Pa.R.Crim.P. 323(h)." *Commonwealth v. Ryan,* 296 Pa. Super. 222, 228, 442 A.2d 739, 742 (1982). The Commonwealth's burden is by a preponderance of the evidence.

Bonasorte, 337 Pa. at 344, 486 A.2d 1368 (citations omitted).

Turning to the case at bar we have reviewed the factual findings made by the suppression court as well as the

record. The court's findings are adequately supported by the record and we are thus bound by them. The court's recitation of these facts contained in its opinion dated February 24, 1987 is accurate and we adopt it as our own.

We have reviewed the briefs submitted by the parties and the authorities upon which they rely. We agree with the suppression court that the multiple issues concerning the appellees' prior statements, presented by the Commonwealth can be concisely discussed as follows:

1). Did insurance counsel act as an agent for the Commonwealth?

2). Was the examination under oath "compelled" testimony obtained in violation of the appellee's fifth amendment rights?

The suppression court thoroughly analyzes these issues, as well as the other issues presented. We find the court's discussion and application of the law to be correct.[1] We adopt it as our resolution of the issues.[2]

Orders affirmed. Case remanded. Jurisdiction relinquished.

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1. The suppression court cites *Commonwealth v. Lapia*, 311 Pa. Super. 264, 457 A.2d 877 (1983). *Commonwealth v. Lapia* was consolidated with *Commonwealth v. Dugger* at the same citation. The reversal of *Dugger* by the Pennsylvania Supreme Court in *Commonwealth v. Dugger*, 506 Pa. 537, 486 A.2d 382 (1985) does not affect our reliance on the suppression court's opinion.

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2. Notwithstanding our substantive reliance on the suppression court's opinion, we view with disfavor the inordinate delay of the lower court in filing that opinion. The Commonwealth filed its notices of appeal on or before September 6, 1984. The court's opinion was dated February 24, 1987 and filed February 25, 1987. We strongly disapprove of such delay.

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

TRIAL DIVISION — CRIMINAL SECTION

COMMONWEALTH OF PENNSYLVANIA,	:	MAY TERM, 1983
vs.	:	
WALTER L. BALL	:	No. 3641-44
COMMONWEALTH OF PENNSYLVANIA	:	MAY TERM, 1983
vs.	:	
BARRY KABINOFF	:	No. 3645-48

OPINION

MAZZOLA, W.J.,

The defendants in this matter, Walter L. Ball and Barry Kabinoff, are each charged with Arson Endangering Persons/Arson Endangering Property (Bill No. 3641, 3645); Criminal Conspiracy (Bills No. 3642, 3646); Attempted Theft by Unlawful Taking or Disposition (Bills No. 3643, 3647); and Risking Catastrophe (Bills No. 3644, 3648).

The instant appeal was filed on September 6, 1984, by the Philadelphia District Attorneys Office, hereinafter Commonwealth, from this Courts granting of defendants Motion to Suppress Evidence on August 9, 1984; and the denial of the Commonwealth's motion under inevitable discovery and independent basis for obtaining evidence which was argued and denied on August 14, 1984. Further, the Commonwealth appealed this Courts order due to this

Courts suppression of evidence which materially affects the ability of the Commonwealth to proceed at trial.

The evidence at the suppression hearings demonstrated the following. Walter Ball and Barry Kabinoff, the defendants herein, are the sole owners of Austin Truck Rental, 2300 Church Street, Philadelphia, Pennsylvania. Walter Ball, the companies' President, owned ninety (90%) percent of the companies stock and Barry Kabinoff, the companies Vice President, owned ten (10%) percent of the companies stock. The defendants sub-leased a garage building and (appurtenant) parking from Cooper Jarrett Trucking Company.

On March 16, 1982, a fire occurred at the Austin Truck Rental premises which resulted in severe damage to the garage building. At the time of the fire, Cooper Jarrett declared bankruptcy and vacated the premises. The defendants were in the process of negotiating a new lease with the lessor when the fire occurred.

On April 29, 1982, the defendants submitted a claim to the Young Adjustment Company, who, in turn, submitted said claim to the defendants fire insurance carrier, Hartford Accident and Indemnity Company, hereinafter Hartford. The total amount of the claim presented to Hartford was $91,332.35.

On the date of the fire, Lieutenant Thomas Schneiders, Assistant Fire Marshall, was assigned to investigate the fire scene at 2300 Church Street. Lieutenant Schneiders made an immediate determination that the fire was of an incendiary nature on the evening of his investigation (N.T. January 26, 1984, Pages 104-105). He made a subsequent determination that the fire was an arson ". . . a few days later when we had received the information that there was a witness to the (sic) seeing people on the premises at the time of the fire (N.T. January 26, 1984, Page 105).

On or about June 8, 1982, Lieutenant Thomas Schneiders presented Hartford Insurance Company Claims Supervisor, James J. Morris, Jr., with a request pursuant to the Arson Reporting Immunity Act, 40 Pa. S.A. §1610.1 *et seq.*, seeking the contents of the Hartford's file. Lieutenant Schneiders said "words to the effect that the Fire Marshall's Office was investigating the fire, that it was a suspected arson and they wanted certain documents from our file. I (Morris) asked him if the insured was a suspect and he (Schneiders) said yes" (N.T. January 25, 1984, Page 159). Lieutenant Schneiders was permitted to examine and copy parts of the companies file.

On or about June 16, 1982, Hartford forwarded their file to Insurance Counsel,who is employed in the arson and fraud section of Cozen, Begier & O'Connor (N.T. January 17, 1984, Page 41). Insurance Counsel testified, "I knew it was classified an arson fire because my recollection is that the Fire Marshall's report was in the documents we got (N.T. January 17, 1984, Pages 40-41). Counsel contacted Assistant District Attorney Larry Brown "To see if he knew anything about the fire (N.T. January 17, 1984, Page 45). Counsel testified, ". . . any information with respect to the fire was in my view important" (N.T. January 17, 1984, Page 50). He next contacted Dan Hogan. "I (counsel) contacted the Fire Marshall's Office and set up a meeting with Dan Hogan, a detective from the Arson Squad of the Fire Marshalls Office" (N.T. January 17, 1984, Pages 55-56). On or about June 16, 1982, during their meeting at the Fire Administration Building, Detective Hogan showed counsel copies of the Police Investigative Reports (75-49's). When questioned, "Did it become clear to you at that time, at that meeting, that Walter Ball and Barry Kabinoff were under investigation?" Counsel responded, "Yes" (N.T. January 17, 1984, Page 61).

On or about June 23, 1982, counsel had a subsequent meeting with Lieutenant Schneiders and Captain Lapree

at the Fire Administration Building. During the meeting, counsel requested to view any photographs of the fire scene in Lieutenant Schneider's possession. Since Lieutenant Schneiders had taken no photographs of the fire scene during his investigation, counsel wanted to hear orally from Lieutenant Schneiders the fire department's determination that the fire at 2300 Church Street was determined to be an arson. Counsel testified that "I may have told somebody from the Fire Marshall's Office, either Lapree or Schneiders that day I was going to take an examination under oath . . ." (N.T. January 17, 1984, Page 84).

Counsel notified the defendants on June 24, 1982, that in order to comport with the provisions of their Fire insurance policy, the two defendants must submit to an examination under oath to be conducted by him on July 21, 1982. Counsel testified that "within two days of my getting the file from Hartford, I recommended that an examination under oath of Mr. Ball and Mr. Kabinoff be taken" (N.T. January 17, 1984, Page 96). Ironically, even though counsel received the file from Hartford on or about June 16, 1982, counsel directed letters to the defendants requesting examinations under oath only one day after his second meeting with Philadelphia Fire Department Officials. In addition to submitting to the aforementioned examination under oath, the defendants were required to prepare a second Proof of Loss Statement. As a result from counsel being privy to sensitive police information, he responded affirmatively to the following questions . . . "Did you have any information as a result of either reading the 49's or talking to the Fire Marshall's people, detectives, that the amount of loss alleged to have been sustained by the insured, what they claimed was questioned by the police in any manner" (N.T. January 17, 1984, Pages 110-111). Clearly showing that he knew a crime was suspected and that Messrs. Ball and Kabinoff were the prime suspects of both the police and the Fire Department.

A clear understanding of the events between the date of the fire, March 16, 1982, and the examination under oath on July 21, and July 22, 1982, is necessary.

Lieutenant Schneiders determined, on the night of his investigation, that is almost immediately after the discovery of the fire, that it was arson. Then almost immediately thereafter, after consultation with his superiors, he delivered the Fire Departments form letter drawn up under the auspices of the Arson Reporting and Immunity Act to the Hartford Insurance Company. He hand delivered this letter to Mr. Morris at the Hartford Insurance Company and received photostatic copies of the relevant portions of the Hartford's file and, in fact, the Arson Reporting letter, known in the trade as a "cover letter" was stapled to the inside of the Hartford's file.

During the same period of time, Detective Hogan of the Arson Squad and Detective McKee of the regular Police Division were also investigating the matter. Both of these detectives were aware, at least to one of the defendants if not both, that further interviews with them would be fruitless as they had already declined interviews on the subject matter of the fire; requesting the assistance of an attorney prior to any interviews. In fact, as early as June 6, 1982, Detective Hogan believed that these defendants were in the process of committing the crime of fraud on the insurance company and felt that interviews of either Mr. Ball or Mr. Kabinoff would be fruitless because they are "intelligent men" and had he given the Miranda warnings prior to an interrogation he would have not been able to secure an interview with either of them.

Further, Detective Hogan and Lieutenant Schneiders also testified that they were familiar with the contents of the Arson Reporting Immunity Act and as well as the contents of the Standard Fire Policies issued in the Commonwealth of Pennsylvania that require, among other things, an examination under oath. In fact, both testified that they

expected that the attorney for the Insurance Company would in fact take an examination under oath of Messrs. Ball and Kabinoff during their own investigation of the case.

This Hartford file, as above described, was received by counsel for the Insurance Company on or about June 15th or June 16, 1982. Counsel immediately began this investigation into the matter which included a review of the Fire Marshalls Report in the file designating the Fire of the insured premises as an arson. The day after receiving the file, he interviewed Detective Hogan at the Fire Administration Building where he reviewed the police reports, as well as had conversations with the Detective. When the Detective testified, he informed counsel that he believed a crime was in fact being committed by these defendants.

In fact, counsel for the Insurance company's first action after receiving the file was to contact representatives of the Philadelphia District Attorneys Office who were believed to be the Liason with the Fire Department, for a trade of information if possible. Further, counsel testified that it is his belief that it was not unresonable for the Fire Marshall to have expected that he would in fact conduct an examination under oath.

The conclusion was as counsel testified, that "in light of facts I had learned", (there was a question in his mind as to) "whether or not there would be liability on the part of Hartford for the loss."

On July 21 and 22, 1982, the defendants and their attorney, Warren Vogel, Esquire, appeared in Insurance Counsel's Office to commence the examination under oath in this matter. Mr. Vogel placed the following on the record . . . "I believe that we have reached some form of agreement on the production which will be made, including an agreement whereby you, on behalf of your client, have agreed that the financial and business information being delivered

to you today is being delivered under a stipulation of confidentiality, specifically that none of this information will be divulged to any third person, that is any person other than members of your firm or persons within Hartford, and that both your firm and Hartford agree that it will not be disseminated elsewhere . . ." Counsel acceded to this agreement but qualified his acceptance with the following statement, "I have no objection to the agreement with the understanding that if this, if the notes of testimony and exhibits of this case be subpoenaed by anybody thats out of control of my law firm and Hartford to resist the subpoena. Aside from that we agree that none of the information that produced by us today will be divulged to any third party" (N.T. January 17, 1984, Pages 114-115, Examination under Oath, July 21, 1982, Pages 3-4).

On September 3, 1982, Assistant District Attorney Franklin Noel, sent a formal request to Insurance counsel pursuant to the Arson Reporting Immunity Act, supra, to provide him with a copy of the examination under oath conducted on the defendants. Counsel complied with that request via a letter on September 17, 1982, wherein he enclosed a copy of the transcript of the examination under oath and also a list of Austin Truck Rental Employees even though he testified that he was "not sure that it (employee list) was requested of me" (N.T. January 25, 1984, Page 87). Counsel admitted on the record that he received only formal notice to disclose the examination under oath pursuant to the Arson Reporting Immunity Act and did not receive a formal subpoena to disclose said information. Although counsel's disclosure clearly comports with the Arson Reporting Immunity Act, his disclosure is in complete contravention of his agreement with defendants counsel Warren Vogel, Esquire, at the outset of the examination under oath.

Detective Hogan further testified that he reviewed the examination under oath "in Frank Noel's Office I think a

couple of weeks before we arrested your clients" (N.T. January 26, 1984, Page 57).

On February 4, 1983, over ten months after the fire, the defendants were arrested by the Philadelphia Police Department and were charged, supra.

The defendants, in their Motion to Suppress filed on July 11, 1983, pray that the transcript of the examination of the defendants conducted on July 21 and 22, 1982, by Insurance Counsel, be suppressed. On August 9, 1984, this Court granted the defendants prayer for relief contained in the Motion to Suppress. Further on August 14, 1984, this Court further suppressed the employee list of Austin Truck Rental which the Commonwealth would seek to introduce at trial. The employee list was suppressed as tainted evidence and fruit of the poisonous tree vis-a-vis the suppressed examination under oath. See *Wong Sun v. United States*, 371 U.S. 471 (1963).

In their Motions to Suppress, the defendants advanced numerous and specific arguments which were entertained by the Court. Although various sub-issues exist which will be addressed, *ad seriatim*, within the text of this opinion, the two main issues presented may be framed as follows:

1. Did Insurance Counsel act as an agent for the Commonwealth?
2. Was the examination under oath "compelled" testimony obtained in violation of the defendants Fifth Amendment Rights?

After a painstaking review and scrutiny of the defendants and Commonwealth's motions, briefs, memoranda of law and applicable caselaw with respect to the above, this Court answered both questions in the affirmative as presented by the defense. The Commonwealth appealed arguing that this Court should have granted the Commonwealth's motion for inevitable discovery and independent basis for obtaining evidence.

I

It must be noted that defense counsel and the Philadelphia District Attorneys Office submitted voluminous and extensive memoranda of law and briefs in this matter. Since the writings have exhausted an extreme amount of caselaw vis-a-vis the issues presented therein, this Court is compelled to utilize caselaw presented in the briefs within the text of the opinion.

The first issue presented to this Court is did Insurance Counsel act as an agent of the Commonwealth of Pennsylvania, (hereinafter "Commonwealth"). In light of the facts set forth in this opinion, supra, it is fundamentally clear to this Court that Counsel did act as an agent of the Commonwealth of Pennsylvania during the course of his investigation and subsequent examination under oath of the defendants. Counsel furthered this agency relationship with the Commonwealth when he unilaterally forwarded a list of Austin Truck Rental Companies employees to Assistant District Attorney Franklin Noel on September 17, 1982. He testified that "I think its obvious it (employee list) could be helpful" to Mr. Noel's investigation (N.T. January 25, 1984, Page 88-89). Appellee's characterization of a "symbiotic" relationship existing between the Commonwealth and Counsel is an extremely accurate depiction of said relationship. The statute under which counsel fostered his agency with the Commonwealth was the Arson Reporting Immunity Act (hereinafter "Act"), 40 Pa. S.A. §1610.1 *et seq*. The Act provides in pertinent part, ("any authorized agency may, in writing, require any insurance company at interest to release to the requesting authorized agency any or all relevant information of evidence deemed important to the authorized agency which the insurance company may have in its possession relating to a fire loss under investigation by the authorized agency . . ." 40 Pa. S.A. §1610.3(a).) The Act further provides "Notification to Policyholder. — When information is given by any insurance

company to an authorized agency pursuant to subsection (a) or (B):

> (1) The insurance company shall send written notice to the policyholder about whom the information pertains, except if the insurance company receives notice that the authorized agency finds, based on specific facts, that there is reason to believe that such information will result in:
>
> (i) Endangerment to the life or physical safety of any person.
> (ii) Flight from prosecution.
> (iii) Destruction of or tampering with evidence.
> (iv) Intimidation of any potential witness or witnesses.
> (v) Obstruction of or seriously jeopardizing an investigation.
>
> 40 Pa. S.A. §1610.3(c)(1)

On June 8, 1982, Lieutenant Thomas Schneiders presented Hartford Claims Supervisor, James Morris, a form letter requesting "pertinent policy information and the statement of loss submitted by Young Adjustment Company and other relevant information or evidence" pursuant to the Act. (N.T. January 25, 1984, Pages 156-160, Cm-4). Clearly, in contravention of the Act, the defendants were not advised that certain documents and records had been reviewed and photocopied for the Philadelphia Fire Department.

On July 21 and 22, approximately four months subsequent to the fire, Insurance Counsel conducted an examination under oath of the defendants. Defendant Kabinoff was examined only on July 21, 1982 and Defendant Ball was examined on both dates. Due to the fact that Detective Hogan's investigation was stymied and he had not even attempted to interview witnesses in over five months, the detective eagerly awaited the transcription of the examination under oath so that his investigation would hopefully proceed forward. A similar situation existed with respect

to Lieutenant Schneiders as, he too, was cognizant of the fact that the defendants did not wish to discuss the case unless in the company of their attorneys. It is clear therefore to all parties concerned, that is, counsel for the Insurance Company, the Insurance Company itself, the Fire Marshalls Office, the Arson Investigation Squad and the Police Department that defendants had elected not to make any statements to the Investigating Authorities and that the investigating authorities were expecting the Insurance Company to conduct an examination under oath. In addition, counsel exerted extreme economic leverage and compulsion over the defendants to the benefit of his client and the Commonwealth. This Court is of the firm belief that both Detective Hogan and Lieutenant Schneiders both seasoned arson investigators, *knew* that it was the normal course for arson and fraud unit attorneys to conduct examinations under oath in situations of this kind and simply waited and acquiesced for the results of same (emphasis added). The use of form letters, the fact that the so called cover letter was introduced into the file very early in the history and investigation of the case, the information that defendants were invoking their constitutional right to consult with an attorney before being interviewed and the experience of the officers involved with the Insurance companies and examinations under oath in the past clearly underline the relationship between counsel for the Insurance company and the various investigating authorities. (As an aside, the Court would note that in the normal course of business, it received an announcement in the mail during the pendency of this Motion that the retired, long time Chief for the Fire Department, Joseph Rizzo, had been hired as a consultant by the particular law firm in question). Clearly, the investigations of the Philadelphia Police and Fire Departments were stymied and the examination under oath, unbeknownst to the defendants, was the Commonwealth's only avenue to proceed forward and ultimately effectuate the defendants' arrest.

It is clear from subsequent happenings the effect of all these procedures and the examination under oath had upon the history of this case. As cited above and below, it is clear that the examination under oath and the other evidence gained as a result of it, namely the employee list, were delivered to the District Attorneys Office in the fall of 1982, and eventually formed the basis for the probable cause affidavit relevant to the various warrants, including arrest warrants, that were issued in this case.

It is clear in this jurisdiction that private individuals can assume governmental functions which are tantamount to the private individual becoming an agent of the Commonwealth (emphasis added). In *Commonwealth vs. Bordner,* 432 Pa. 405, 247 A.2d 612 (1968), the Pennsylvania Supreme Court held that inculpatory statements made by an accused to his mother after police brought the mother to the hospital where the accused was confined were suppressible where the officers investigations had focused on the accused and he was not given appropriate *Miranda* warnings. The defense also cites *Commonwealth vs. Clark,* 267 Pa. Super. 285, 406 A.2d 806 (1979) and this Court also adopts the holding and rationale in that case. In *Clark,* the Court held that a psychiatrist, to whom a juvenile in police custody made incriminating statements after receiving *Miranda* warnings, was acting as an agent of the Commonwealth.

In *Commonwealth vs. Dembo,* 451 Pa. 1, 301 A.2d 689 (1973), the Pennsylvania Supreme Court's rationale is dispositive of the case at bar. In *Dembo,* the state police, acting on information from the federal authorities that the defendant was involved in LSD manufacturing, asked the postal service to notify them if the defendant received any packages in the mail. About two months after the request, the assistant postmaster notified the police that the defendant had received a package, and "at the request and direction of the trooper", opened the package which contained hashish.

Quoted from *Commonwealth vs. Lapia,* __ Pa. Super. __, 457 A.2d 887 (1983).

The Court in *Dembo* stated that . . . "the record is clear that the postal authorities were merely a *tool* used by police officials to further a police investigation. The record is barren of any facts that would have permitted the police officials in the case at bar to open this parcel and examine its contents." 451 Pa. at 7-11, 301 A.2d 693, 695 (emphasis added).

Clearly, the Courts ruling and rationale is on point with the case at bar. As stated, supra, the Commonwealth's investigation of the defendants was stymied but for Insurance counsel's diligent representation of his client and assistance to the Commonwealth pursuant to the provisions of the Act. Through economic coercion and compulsion of the defendants to submit to an examination under oath, counsel was able to achieve what the Commonwealth could not — testimony of the defendants under oath and an employee list of Austin Truck Rental, Inc. Analogous to the *Dembo* case, "the overwhelming evidence forces the conclusion that this search was made by police officials in furtherance of a police investigation then in progress and the postal authorities were merely the means selected in an attempt to avoid the necessity of establishing probable cause." Id at 301 A.2d at 693, 695. In the case at bar, Insurance counsel acting as an agent for the Commonwealth and under the auspices of the act, established probable cause to arrest the defendants when they were compelled to submit to an examination under oath.

II

With respect to the second issue presented by defendants, this Court finds that the examination under oath is clearly *compelled* testimony which is violative of the Fifth Amendment rights and must be suppressed along with the

fruits thereof. During the examination under oath, the defendants were represented by a civil attorney. Insurance counsel stated, supra, that pursuant to an agreement between counsel, the notes of testimony and the exhibits would not be divulged to any third party absent being served with a subpoena(s). Unbeknownst to the defendants, nor their counsel, on June 8, 1982, Hartford acceded to a request by Lieutenant Schneiders for information regarding their case pursuant to the Act. Further, the defendants were never appraised that Insurance counsel had numerous contacts with Philadelphia Police and Fire Officials nor that counsel was privy to sensitive information from the investigative files of these departments, nor that counsel learned from his contacts with the aforementioned that the defendants were suspects in the case and the defendant Ball had refused to talk further to the Police (N.T.January 17, 1984, Page 61, 169).

At the outset of the examination under oath conducted on July 21, 1982, counsel admonished the defendants . . . "if I ask you a question which you deem immaterial to your claims submission to Hartford and you do not want to respond to it you should realize that (sic) failure to respond may in and of itself be considered a material breach of the policy of insurance. If you are uncomfortable with my questions or they intimidate you in any fashion and you don't answer my questions, I would just let you know that it is your duty to appropriately respond whether or not your attorney directs you not to" (CM-3 at Page 7).

This Court finds that the United States Supreme Court case of *Lefkowitz vs. Cunningham,* 431 U.S. 801, 97 S. Ct. 432 (1977) is dispositive of the above issue. Quoting Lefkowitz, "We begin with the proposition that the Fifth Amendment privilege against compelled self-incrimination protects grand jury witnesses from being forced to give testimony which may later be used to convict them in a criminal proceeding. See, e.g. *United States vs. Washington,* ante

at 186-187, 52 L. ed 2d 238, 97 S. Ct. 1814. Moreover, since the test is whether the testimony might later subject the witness to criminal prosecution, the privilege is available to a witness in a civil proceeding, as well as to a defendant in a criminal prosecution. *Malloy vs. Hogan,* 378 US 1, 11, 12 L Ed 2d 653, 84 S. Ct. 1489 (1964). In either situation the witness may "refuse to answer unless and until he is protected at least against the use of his *compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant.*" (emphasis added). *Lefkowitz vs. Turley,* 414 US 70, 78, 38 L Ed 2d 274, 94 S. Ct. 316 (1973). Thus, when a state compels testimony by threatening to inflict potential sanctions unless the constitutional privilege is surrendered, that testimony is obtained in violation of the Fifth Amendment and cannot be used against the declarant in a subsequent criminal prosecution. In *Garrity vs. New Jersey,* 385 US 493, 17 L Ed 2d 562, 87 S. Ct. 616 (1967), for example, police officers under investigation were told that if they declined to answer potentially incriminating questions they would be removed from office, but that any answers they did give could be used against them in a criminal prosecution. The Court held that statements given under such circumstances were made involuntarily and could not be used to convict the officers of crime.

These cases state that government cannot penalize assertion of the constitutional privilege against compelled self-incrimination by imposing sanctions to compel testimony which has not been immunized. It is true, as appellant points out, that our earlier cases were concerned with penalties having a substantial economic impact. But the touchstone of the Fifth Amendment is compulsion, and direct economic sanctions and imprisonment are not the only penalties capable of forcing the self-incrimination which the amendment forbids.

In any of these contexts, therefore, a witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any *subsequent criminal case* in which he is a defendant (emphasis added). *Kastigar vs. United States,* 406 U.S. 441, 92 S. Ct. 1653 (1972). Absent such protection, if he is nevertheless compelled to answer, his answers are inadmissible against him in a later criminal prosecution. *Lefkowitz vs. Turley,* 414 U.S. 70, 94 S. Ct. 316 (1973).

In the case at bar, the testimony of the defendants was compelled in every sense of the word. Said the defendants civil attorney at the examination under oath, "in that connection I saw my clients on the horns of a dilemma, in that they had submitted a Proof of Loss. The Insurance company was taking the position that unless you tell us what we want to know, we are not going to pay . . ." (N.T. January 18, 1984, Pages 29-30). Little did the defendants know that the Commonwealth was eagerly awaiting to request the examination under oath and the other related documents upon which to continue their stymied investigation and ultimately effectuate the defendants arrest on February 4, 1983, over ten months after the fire. In light of the unwillingness of defendant Ball to talk to Police and Fire Investigators and the fact that Detective Hogan conducted no interviews for numerous months with respect to this case even though he was the assigned detective thereto, it is clear that the investigating authorities acquiesced and awaited Insurance counsel's assistance in this case. Clearly and unequivocally, had the defendants been appraised that they were targets of a police investigation and that the examination under oath could be forwarded to the authorities by writing a simple letter pursuant to the Act, this Court feels that the defendants would not have submitted to the examination under oath nor submitted documents and other information to the Hartford. Certainly had the defendants been privy to the foregoing and to all of the

information known to Insurance counsel, they would have had the option to exercise their rights pursuant to the Fifth Amendment to the United States Constitution and remained silent.

This Court further finds that there existed no bad faith on the part of Insurance counsel and the Commonwealth. Counsel and the Commonwealth clearly acted diligently to best serve their clients — the Hartford and the citizens of Philadelphia. However, due to the fact that the defendants fundamental constitutional rights were egregiously violated, the examination under oath and the fruits thereof, the employee list, must be suppressed.

As an aside and a potential remedy to the constitutional infirmities aforementioned, this Court proposes the Arson Reporting Immunity Act, although not unconstitutional, should be amended by the legislature. The proposed amendment by this Court would require that insured(s) be given warnings prior to acceding to insurance company requests for documents, other pertinent information, or for an examination under oath. The warnings contemplated this Court are not exactly the same types of warnings well known as the "Miranda" warnings. The Court feels that under circumstances as are found in this case, namely that at the time of the examination the Insurance company is already on notice that the investigating authorities, the police or the District Attorneys Office, has already requested the contents of the Insurance companys file relevant to the investigation; that the insured or the persons who are subject to examination under oath, be advised that the Insurance Company had in fact received such a request and that under the law they are required to deliver it to the requesting authority. This Court does not see a specific or significant difference between the fact that the District Attorneys Office formally requested it subsequent to the examination under oath and that the Fire Marshalls Office had filed a request prior to the examination under oath.

The fact remains that the investigating authorities had already requested it at the time of the examination under oath and the issue is not saved or salvaged by a new letter from the representative District Attorney several months after the questioned examination. If the insureds are warned and the Court is convinced that there exists a knowing, intelligent and voluntary waiver of same, such constitutional infirmities as exist in the case at bar would be abrogated.

The final issue for this Court to decide is whether the Commonwealth's Motion under Inevitable Discovery and Independent Basis for obtaining evidence was properly denied. This Court finds that the evidence in question, an employee list from Austin Truck Company was properly suppressed as said list represented the derivative fruit of illegal conduct and thus is tainted as per *Wong Sun vs. United States,* 371 U.S. 471, 83 S. Ct., 407 (1983) and its progeny.

The Commonwealth argued that the recent United States Supreme Court case of *Nix vs. Williams,* 104 S. Ct. 2501 (1984) applies to the case at bar and that the employee list is admissible under the doctrine of "inevitable discovery". In *Nix,* following the disappearance of a ten year old Iowa girl on December 24, 1968, a large scale search ensued. The defendant, Williams, surrendered to the local police department and contacted a local attorney whom he wished to meet with at the police station. The police officials informed the attorney that they would transport the defendant to the police station in Des Moines, Iowa *without questioning him* (emphasis added). While in the custody of two detectives enroute to Des Moines, Detective Learming began a conversation with Williams which ultimately elicited inculpatory statements from Williams. Williams agreed to lead the officers to the child's body which was ultimately located a short time later approximately two and one-half miles from a search team "and essentially

within the area to be searched." *Nix vs. Williams,* supra at 2505.

The United States Supreme Court adopted the ultimate and inevitable discovery exception to the exclusionary rule and held that if the prosecution can establish by a preponderance of evidence that the information ultimately or inevitably would have been discovered by lawful means, that the deterence rationale has so little basis that the evidence should be received. The Court further held that under the rule, the prosecution is not required to prove the absence of bad faith as such requirement would result in withholding from juries relevant and undoubted truth that would have been available to police absent any unlawful police activity. *Nix* at 2502. This, quite simply, is not such a case and this Court finds that the doctrine of inevitable discovery is inapplicable to the case at bar. This Court is convinced that the employee list was not kept by the defendants in the ordinary course of business and that it was prepared specifically in conjunction with the examination under oath conducted by Insurance counsel. Assigned Detective Hogan testified that he . . . "didn't attempt to interview any employees until November 1982 (N.T. August 14, 1984, Page 24). Detective Hogan knew that the defendants would not avail themselves to interview.

Detective Hogan's course of action therefore was to do nothing. He simply waited and acquiesced for a period of eight months until November 1982, before attempting to interview any Austin employees. It is fundamentally clear to this Court that, but for, the economic coercion to produce the employee list pursuant to the examination under oath, the Commonwealth would not have been privy to that information. Said list was *prepared* by the defendants pursuant to a request to do same by the Commonwealth's agent, counsel for Hartford, and the Commonwealth subsequently used the list to identify and interview potential witnesses to testify at trial. Clearly, the testimony of these

witnesses are tainted because it is derived from the Commonwealth's exploitation of the wrongfully compelled production of the employee list.

Applying the test enunciated in *Wong Sun,* supra, this Court must now decide "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been received by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Id at 487-488.

This Court finds that the employee list represents derivative fruit of the poisonous tree and that the taint thereon was not purged. This Court further finds that *Nix,* supra., and the notion of ultimate or inevitable discovery is inapplicable to the case at bar because the prosecution clearly and unequivocally failed to establish by a preponderance of evidence that the information (employee list) would have been discovered by lawful means. The list was discovered *solely* as a result of the examination under oath and could not have been discovered otherwise as the employee list was prepared by the defendants for the aforementioned purposes (emphasis added).

WHEREFORE, for the above cited reasons, this Court orders that the transcript of the examination under oath and the testimony of any Commonwealth witness who was identified through the use of the employee list be suppressed at trial.

BY THE COURT:

J.

Dated: February 24, 1987

IN THE

Court of Common Pleas

Trial Division — Criminal Section

COMMONWEALTH OF PENNSYLVANIA	:	MC NOS. 83-01-3674
	:	
v.	:	
WALTER L. BALL	:	and
	:	
and	:	
BARRY KABINOFF	:	83-01-3655

DEFENDANTS' MOTION TO SUPPRESS EVIDENCE

Defendants Walter L. Ball and Barry D. Kabinoff, by their undersigned attorneys, move this Court for entry of an Order suppressing evidence obtained by the Commonwealth in violation of their constitutional rights, and in support thereof aver as follows:

1. On or about June 2, 1983, following a preliminary hearing held on May 26, 1983, the Commonwealth filed informations against Defendants Ball and Kabinoff charging that they intentionally set a fire at 2300 Church Street in Philadelphia on March 16, 1982 and thereafter filed a fraudulent insurance claim for losses occasioned by the fire. Defendants are charged with violating the following provisions of the Pennsylvania Crimes Code:

18 Pa.C.S.A. §3301 (arson endangering persons and property)

18 Pa.C.S.A. §3302 (risking a catastrophe)

18 Pa.C.S.A. §901 (attempted theft)

18 Pa.C.S.A. §903 (criminal conspiracy)

2. On July 21 and 22, 1982, Defendants Ball and Kabinoff were compelled against their wishes to submit to an examination under oath by Michael F. Henry, Esquire, an attorney for Hartford Accident and Indemnity Company ("Hartford").

3. Hartford had previously issued a fire insurance policy to Austin Truck Rental, Inc. ("Austin") on premises leased by Austin at 2300 Church Street, Philadelphia, PA. Defendants Ball and Kabinoff are principals of Austin.

4. Defendants Ball and Kabinoff were informed by Mr. Henry that the terms of Hartford's insurance policy required them to submit to an examination by Mr. Henry and that a refusal to respond to questions posed by him might constitute a material breach of the policy.

5. Prior to the commencement of the aforementioned examination, Defendants Ball and Kabinoff were assured by Mr. Henry that the transcript of the examination would be kept confidential and would not be disclosed to any third party.

6. Unbeknownst to Defendants Ball and Kabinoff, prior to the commencement of the examination by Mr. Henry the Fire Marshall had determined that the fire which occurred at 2300 Church Street on March 16, 1982 was intentionally set and had so informed Mr. Henry.

7. Unbeknownst to Defendants Ball and Kabinoff, prior to the commencement of the examination by Mr. Henry the Fire Marshall's office had determined that they were prime suspects of the investigation into the suspected arson fire at 2300 Church Street.

8. Unbeknownst to Defendants Ball and Kabinoff, prior to the commencement of the examination Mr. Henry had engaged in discussions with the Fire Marshall's office and the Philadelphia Police Department concerning their investigations of the fire at 2300 Church Street and had

been supplied by them with information developed during the course of those investigations.

9. At no time either before or during the examination did Mr. Henry advise or warn Defendants Ball and Kabinoff of their constitutional rights as required under *Miranda v. State of Arizona,* 384 U.S. 436 (1966).

10. Subsequent to the completion of the examination, the transcript of the examination was supplied to the District Attorney's Office by Mr. Henry.

11. Mr. Henry acted, in effect, as an agent of the Commonwealth during the aforementioned examination and his interrogation of Defendants without first giving them the *Miranda* warnings deprived them of due process and constituted a violation of their rights under the Fifth Amendment of the United States Constitution.

WHEREFORE, Defendants respectfully request that this Court enter an Order suppressing the use of the transcript of the examination conducted by Mr. Henry on July 21 and 22, 1982 as evidence at trial.

Gregory T. Magarity
Burt M. Rublin

Attorneys for Defendants
Ball and Kabinoff

OF COUNSEL:

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IN THE

Court of Common Pleas of
Philadelphia County
Trial Division — Criminal Section

COMMONWEALTH OF PENNSYLVANIA	: MAY TERM, 1983
v.	:
WALTER BALL	: Nos. 3641-44
and	:
COMMONWEALTH OF PENNSYLVANIA	: MAY TERM 1983
v.	:
BARRY KABINOFF	: Nos. 3645-48

DEFENDANTS' SUPPLEMENTAL MOTION TO SUPPRESS EVIDENCE

Defendants Walter L. Ball and Barry D. Kabinoff, by their undersigned attorneys, move this Court for entry of an Order suppressing evidence obtained by the Commonwealth in violation of their constitutional rights, and in support thereof aver as follows:

1. On or about June 24, 1982, Michael Henry, Esquire, an attorney for Hartford Accident & Idemnity Co., sent a letter to Messrs. Ball and Kabinoff which demanded, *inter alia*, the production by them of a list of the names and home addresses of their employees who participated in moving certain items from their company's 2300 Church Street premises to its new Castor Avenue premises (Ex. DM-5). Mr. Henry stated in his letter that the production of this list and the other requested documents was required under the terms of Hartford's fire insurance policy and that a refusal to comply with his demands would constitute a material breach of the policy, thereby entitling Hartford to deny the insurance claim filed previously by Defendants.

2. In response to the aforementioned demand, on September 3, 1982 Warren Vogel, counsel for Messrs. Ball and Kabinoff, produced a number of documents to Mr. Henry, including a list of all employees of Austin Truck Rental, Inc. as of March, 1982 (Ex. DM-8). Based upon earlier discussions between Mr. Henry and Mr. Vogel, Defendants Ball and Kabinoff and their counsel were lead to believe that the documents they furnished to Mr. Henry would be kept confidential by him and would not be disclosed to third parties, absent a subpoena demanding their production.

3. Unbeknownst to Defendants, prior to their production of the employee list to Mr. Henry, he and his agents had engaged in numerous meetings and phone conversations with the Philadelphia Police Department, the Philadelphia Fire Department and the Philadelphia District Attorney's Office concerning their investigations of the fire at 2300 Church Street. Mr. Henry had been supplied by these investigative agencies with highly confidential and sensitive information developed by them in their investigations. In turn, Mr. Henry and other agents of Hartford Accident & Indemnity Co. had furnished information and documents obtained during the course of their investigations into the fire to the aforementioned governmental agencies.

4. On or about September 17, 1982, Mr. Henry turned over the aforementioned list of Austin Truck Rental employees to Franklin Noel, the Assistant District Attorney in charge of investigating the Church Street fire (Ex. DM-4). Upon information and belief, Mr. Noel subsequently furnished this list to Detective Daniel Hogan, who utilized the list to identify, locate and interview a number of Austin employees and former employees in November, 1982.

5. Defendants Ball and Kabinoff and their counsel were unaware of the fact that the employee list had been furnished by Mr. Henry to Mr. Noel until January 17, 1984, when the Commonwealth introduced into evidence at the

suppression hearing the September 17, 1982 letter from Mr. Henry to Mr. Noel.

6. Mr. Henry acted, in effect, as an agent of the Commonwealth when he demanded that the Defendants produce a list of their employees. The Defendants' production of this list was compelled against their wishes through economic coercion, and the demand for its production thereby constituted an infringement of their rights under the Fifth Amendment of the United States Constitution, including their right to Due Process and their right not to incriminate themselves.

7. The Commonwealth obtained the list of Austin employees wrongfully and by violating Defendants' rights under the Fifth Amendment. It subsequently utilized this list to identify, locate and interview a number of witnesses whom it now intends to call at trial to testify against Defendants. The testimony of these witnesses is tainted because it is derived from the Commonwealth's exploitation of the wrongfully compelled production of the employee list. Under the holdings of *Wong Sun v. United States,* 371 U.S. 471 (1963) and *Kastigar v. United States,* 406 U.S. 441 (1972) and their progeny, the testimony of witnesses identified and located by the Commonwealth through the employee list represents the derivative fruit of illegal conduct and should therefore be suppressed.

WHEREFORE, Defendants respectfully request that this Court enter an Order suppressing the testimony of any Commonwealth witness who was identified and located by the Commonwealth through the use of the employee list furnished by Mr. Vogel to Mr. Henry on September 3, 1982.

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IN THE

Court of Common Pleas

Trial Division — Criminal Section

COMMONWEALTH OF PENNSYLVANIA	:	MC NOS. 83-01-3674
	:	
	:	
v.	:	
WALTER L. BALL	:	and
	:	
and	:	
BARRY KABINOFF	:	83-01-3655

AFFIDAVIT

Burt M. Rublin, being duly sworn according to law, deposes and says that he is one of the attorneys for Defendants in the above-captioned action and that the facts set forth in the foregoing Motion to Suppress Evidence are true and correct to the best of his knowledge, information and belief.

_____

Burt M. Rublin